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IN THE

Supreme Court of the United States

October Term, 1954

No. [redacted] 239

HOMEDALE TRACTOR & EQUIPMENT CO., A CO-PARTNERSHIP CONSISTING OF CYRIL W. RADCLIFFE and WILBUR W. MANCKE,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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IN THE

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No. 282

HOMEDALE TRACTOR & EQUIPMENT CO., A CO-PARTNERSHIP CONSISTING OF CYRIL W. RADCLIFFE and WILBUR W. MANCKE,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

The Homedale Tractor & Equipment Co., a co- partnership consisting of Cyril W. Radcliffe and Wilbur W. Mancke, Petitioner herein prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on the 3rd day of March, 1954.

OPINIONS BELOW

The Order of the National Labor Relations Board (R 43) is reported in 101 NLRB 55 and the Opinion of the Court of Appeals (R 177) is reported in 211 F. 2d 309.

QUESTIONS PRESENTED

I

Whether there is sufficient evidence in the record considered as a whole to support the findings of the Court of Appeals that the Petitioner had knowledge of the union activities at the time of the discharge of employees Snyder, Maybon and Watkins.

II

Whether there was sufficient evidence on the record considered as a whole to support the finding of the Court of Appeals that the Petitioner, in addition to having knowledge of the union activities,

(a) discharged the employees because of their union activities,

(b) that the discharge of the employees was the proximate cause and had a predictable effect of discouraging membership in the union.

III

Whether there was sufficient evidence on the record as a whole to support the finding of the Court of Appeals that the Petitioner discharged the employees Jess and Ernest Runger for membership in the union.

IV

Whether the Order of the Court of Appeals should be enforced by the National Labor Relations Board where under its revised rules effecting future and

ling cases, the Board would be without jurisdiction
iis case.

STATUTES INVOLVED

he relevant provisions of the National Labor Re-
ons Act as amended (61 Stat. 136, 29 U. S. C.,
p. V, Secs. 151, et seq.) are set forth in the appendix
ages 38, 39 and 40.

STATEMENT OF THE CASE

'he Petitioner, the owner and operator of a small
m implement business in the town of Homedale,
s charged in the complaint before the National Labor
lations Board with violations of Sections 7 and 8
) (1) and (3) with the Board claiming jurisdiction
der the provisions of Section 2 (6) and (7) of the
t, the principal charge being that the Petitioner
lawfully and discriminatorily discharged five em-
yees for engaging in union activities two of said
e employees having been reinstated voluntarily on
e same basis as their previous employment within a
v days after they severed their employment.

The National Labor Relations Board found against
e Petitioner and the Petitioner appealed to the Court
Appeals and the Order of the National Labor Re-
tions Board was affirmed, but upon the Petition for
ehearing the Decree of the Court of Appeals was
nended as to certain findings by the Board but other-
se approved and Petition for Rehearing as modified
as denied on April 27, 1954.

The Petitioner denied interference with the union and denied any knowledge of the existence of the union or its activities or membership in the union by the employees at the time of the discharge of the three employees that were not reinstated. Petitioner however admits having knowledge that the union was organizing their employees at the time two of the employees, Jess and Ernest Runger, severed their employment. Petitioner logically explains how they were voluntarily rehired at their request and with the unions approval.

The findings by the Trial Examiner based union knowledge on the part of the Petitioner on the following inferences:

(1) That because Homedale was a small community, knowledge of the organizational campaign must have been known by the Petitioner.

(2) That the Petitioner announced the payment under a pension plan on or about the time the union was organizing the employees.

(3) The testimony of an impeached witness (Stimmel) who said that he had talked to the Petitioner after the discharges and the Petitioner said "I know about your meetings."

(4) That because there were several discharges during the course of a week or ten days, it must have been because of union activities.

The Court of Appeals amended the finding by eliminating the finding based on an inference that because Homedale was a small community the Petitioner had knowledge of the existence of the union. The Court of Appeals also modified the finding of the Board that Petitioner had threatened to sell his business if the union came in. With these amendments the findings were approved based entirely on the testimony of the impeached witness Stimmel (R 118-120) the court drawing an inference that when the employer said "I know about your meetings" (the statement having been made *after* discharges) the inference was that he *knew* about the meetings at the time they were held. This is, of course, flatly contradicted by the Petitioner.

The Court of Appeals also sustained the inference by the Board that because the Petitioner announced a payment under his pension plan at or about the time the union was organizing that that act proved knowledge on his part of the existence of the union.

The Petitioner now asks this Court to review the Judgment of the Court of Appeals and to set aside said Decree upon the grounds that the evidence in the record as a whole will not substantiate the findings by the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I

IS THERE SUFFICIENT EVIDENCE IN THE RECORD CONSIDERED AS A WHOLE TO SUP-

PORT THE FINDINGS OF THE COURT OF APPEALS THAT THE PETITIONER HAD KNOWLEDGE OF THE UNION ACTIVITIES AT THE TIME OF THE DISCHARGE OF EMPLOYEES SNYDER, MAYBON AND WATKINS.

The uncontradicted, and undisputed testimony in this case shows that three employee mechanics, without notice to the employer, and without notice to their foreman who was present on the premises (R 93-94) took their tools, coveralls and other equipment (indicating an intention to permanently sever their employment) left the employers property leaving unfinished work at their benches and remained away from their jobs for an entire day. Petitioner inquires do these employees lose the protection of Section 7 (a) of the Act by reason of their unexcused actions?

Petitioner believes this case is contrary to the decisions in both the Eighth and Second Circuits. In the case of *Modern Motors vs. NLRB*, 198 F. 2d 925 the Eighth Circuit Court ruled that the employer was justified in discharging two employees who left the employers plant to obtain legal advice and in discharging a third employee who refused to work until the other two employees returned.

In the Modern Motors case, as in this case, there had been no union organization activities known to the employer at the time of the discharges. The Court in that case stated as follows:

> "It does no seem to us that the evidence here affords any basis for a finding of violation of

> section 8(a) (3) as a fact on the premise that the discharges made had or reasonably could be said in the situation to be likely to have 'the proximate and predictable effect of * * * discouraging membership in a labor organization.'"

In that case, as in the present case, the facts show that the three employees discharged were on their way to consult with the union organizer and were already members of the union.

Petitioner believes this decision is contrary to the decision of the Court of Appeals for the Second Circuit in the case of *NLRB vs. Werb*, 192 F. 2d 160, wherein the court ruled that an employer had a right to discharge employees who, without notice, left the employer's premises.

We believe this case is contrary to the principle established in the cases of *Associated Press vs. NLRB*, 301 U.S. 103, *Jones & Laughlin Steel Corp. vs. NLRB*, 301 U. S. 1, and *Fruehauf Trailer Co. vs. NLRB*, 301 U.S. 49 which cases, with others, hold as the court stated in the Associated Press case:

> "The act does not compel the petitioner to employ anyone; it does not require that the petitioner retain in its employ an incompetent editor or one who fails faithfully to edit the news to reflect the facts without bias or prejudice. The act permits a discharge for any reason other than

union activity or agitation for collective bargaining with employes."

Petitioner calls attention to the fact that the time element is important in the discharge of these employes The three employees were discharged prior to any official notice from the union and prior to any knowledge given to the employer by the union or any of his employees as to union membership. In fact the record shows a studied attempt to conceal this knowledge from the employer. (R 80-87)

II

IS THERE SUFFICIENT EVIDENCE ON THE RECORD CONSIDERED AS A WHOLE TO SUPPORT THE FINDING OF THE COURT OF APPEALS THAT THE PETITIONER, IN ADDITION TO HAVING KNOWLEDGE OF THE UNION ACTIVITIES, (a) DISCHARGED THE EMPLOYEES BECAUSE OF THEIR UNION ACTIVITIES, (b) THAT THE DISCHARGE OF THE EMPLOYEES WAS THE PROXIMATE CAUSE AND HAD A PREDICTABLE EFFECT OF DISCOURAGING MEMBERSHIP IN THE UNION.

As the decision of the National Labor Relations Board was modified by the Court of Appeals the findings of the Board alleging knowledge on the part of the employer at the time of the discharges is based on two propositions.

(1) That because the employer called a meeting of the employees to announce the payment of a quarterly payment under a pre-established pension plan, this meeting being at or about the time the union was organizing the employees, this fact showed knowledge on the part of the employer that the union was organizing, and

(2) A statement by a mixed-up, impeached and confused employee that the employer had stated to him several days *after* the discharges that he, the employer, "knows what's going on and knows about the employees' meetings." (R 118-119-120)

Petitioner believes that drawing an inference of knowledge based on the above propositions is contrary to the decisions in the Second, Fourth and Eighth Circuits.

To establish knowledge, the Board and the Court of Appeals sustained a finding that the Petitioner's witnesses were evasive and unreliable. On this question we quote from the concurring opinion of Judge Pope:

> "The fact that the Board, as it had the right to do, refused to credit the testimony of the employers that they did not know of the union activity, is no proof that they did. Belief that a witness is lying is not a substitute for evidence that the opposite of his testimony was the fact.

A witness who testified that a horse was white, in a manner and with such demeanor as to convince the tribunal that he is testifying falsely, does not thereby furnish proof of an allegation that the horse was black. A district court, furnished with nothing better than that, would have to direct a verdict against its proponent. *Cf. Dyer vs. MacDougall,* (2 cir.), 201 F. 2d 265, 269.

"To my mind the events of June 20, (the date of the pension plan meeting) taken together, disprove the Board's charges. I cannot think the Board could seriously believe that in order to influence the men respecting their concerted activities the employers, on that very evening, both wooed the men with bonuses and abused and insulted them with accusations 'in a loud and angry tone of voice'. And consider also the fact that when Maybon and Watkins, on June 22, were discharged for having taken their tools and left without notice the day before, Snyder, who had done the same thing, was kept on when he told a tale about having gone home. Surely this would indicate that *it was not then known that Snyder had been organizing a union.*"

If the reasoning of Judge Pope is sound, and Petitioner believes it is, the case now rests on the lone finding that the employee Stimmel, a witness that confesses that he was confused and admits on cross examination that he was wrong in his direct examina-

tion (R 118, 119, 120) Radcliffe says the conversation was twenty to thirty days after the discharge (R 134). It seems extremely far fetched and a grasping at straws for the Board and Court of Appeals to sustain a finding on this guess and surmise as to what time, past or present, Radcliffe was refering to when he used the present tense in his conversation. (R 135)

Petitioner believes that knowledge cannot be established by inferences. This case is contrary to the decisions of the Court of Appeals for the Fourth Circuit in the case of *NLRB vs. Shen-Valley Meat Packers, Inc.*, 211 F. 2d 289 (March, 1954) wherein the court held:

> "Substantial evidence, such as would support a finding that employer or union knew of certain employees' membership in rival union and effected their discharge for that reason, would be evidence furnishing a substantial basis of fact from which fact in issue could reasonable by inferred, and the test would not be satisfied by evidence which merely created a suspicion or which amounted to no more than a scintilla or which gave equal support to inconsistent inferences."

In the same case the court stated:

> "The Board has the burden of proving this knowledge and it is not sufficient that the proof is based on suspicion or surmise. *NLRB vs. Sparks-Withington Co.*, 6 Cir., 119 F. 2d 78."

Petitioner believes that this decision is contrary to the decision in the Eighth Circuit in the case of *NLRB vs. Falls City Creamery Co.*, 207 F. 2d 820 (Nov. 1953) wherein the court held an inference cannot arise where there is no direct proof of knowledge on the part of the employer and where all those who knew of the union's activities prior to the discharges did not report this knowledge to the employer, a fact which was established in the instant case. And particularly where the employer denies knowledge of the union's activities prior to the discharge. The court also held in the Falls Creamery case that an inference of knowledge cannot be drawn just because the employees were discharged at a time when the union was trying to organize. The court stated:

> "The explanation of respondent for the discharges can only be unconvincing when the evidence of those reasons is discarded. That we may not do in considering the record as a whole."

Petitioner believes that this decision is contrary to the decision in the Second Circuit in the case of *NLRB vs. Ray Smith Transport Co.*, 193 F. 2d 142, wherein the court stated:

> "Although the circumstances may support the inference of a fact, if it is shown by direct unimpeached, uncontradicted and reasonable testimony which is consistent with the circumstances that the fact does not exist, no lawful findings can be made of its existence."

With reference to the testimony of the witness Stimmel, Petitioner believes it would be a gross miscarriage of justice to rest the entire case on the testimony of a witness who admitted that he was confused and mixed-up and who denied on cross-examination the testimony he had given on direct examination. It is grossly unfair to base a conclusion on a conjecture or guess that when the employer talked to the witness Stimmel after the discharges he meant that he had knowledge prior to the discharges. This is just a guess and an attempt to build up an inference. What the employer meant certainly should not stand alone where the same has been denied and logically explained.

Petitioner believes that this case is contrary to the decision in the Second Circuit in the case of *NLRB vs. Arthur Winer, Inc.*, 194 F. 2d 370, wherein the court stated:

> "The Board is not permitted to substitute its guess, unsupported by evidence, for the declared purpose, intention or reason of the employer, and to thus convict the employer of an unfair labor practice."

III

IS THERE SUFFICIENT EVIDENCE ON THE RECORD AS A WHOLE TO SUPPORT THE FINDING OF THE COURT OF APPEALS THAT THE PETITIONER DISCHARGED THE EMPLOYEES

JESS AND ERNEST RUNGER FOR MEMBERSHIP IN THE UNION?

Petitioner believes this case is contrary to the decision in the Seventh Circuit where the undisputed testimony shows that the two employees Jess and Ernest Runger severed their employment after the employer had knowledge of their union activities but were later returned to work at their request and at the request of the union and that these discharges cannot be considered discriminatory. Can it be said that these men were laid off to discourage organizational activities if they were re-employed with the express understanding that they were in favor of the union? If they were fired for union activities, why would the Petitioner contend that it was a matter of disagreement on wages before any charges of unfair labor practices had been made?

In the case of *NLRB vs. Western Cartridge Co.*, 139 F. 2d 855 (7th Cir.) the court held that the inferences of the Board must be based on some evidence and must show that the discharges were for the purpose of discouraging membership in a labor organization and a discharge standing alone will not support an inference that the discharge was for the purpose of discouraging membership in a union.

Petitioner believes that this decision is contrary to the decisions in the Fifth and Eighth Circuits and to its own decision in the Ninth Circuit on the grounds that there is no evidence in the record as a whole to

show that in addition to knowledge on the part of the employer, that the discharges were because of union activities and that the discharges had the effect of discouraging or encouraging membership in the union and was the proximate cause thereof. In the case of *NLRB vs. Bibb Mfg. Co.*, 188 F. 2d 825, the court found under similar circumstances that there was no substantial evidence in the record to support the conclusion that the employees were discharged for union activities. The court quoted the cases of *NLRB vs. Jones & Laughlin*, 301 U. S. 1, and *NLRB vs. Fulton Bag and Cotton Mills*, 175 F. 2d 675.

We believe the decision is contrary to the decision in the Eighth Circuit in the case of *NLRB vs. J. I. Case Co.*, 198 F. 2d 919, wherein the court stated that in addition to knowledge on the part of the employer, it must be shown by substantial evidence that the employee was discharged for membership in the union and that the discharge had the proximate and predictable effect of encouraging membership in the union. There is nothing in the record here to prove either by inference or otherwise that the discharges had the proximate or predictable effect of discouraging membership in the union.

Petitioner believes the decision of this court is contrary to its own decision in the recent case of *NLRB vs. Kaiser Aluminum & Chemical Corp*, decided June 28, 1954, (advance sheets) wherein Judge Fee rendered an opinion that in addition to knowledge on the

part of the employer, it must be shown by substantial evidence that the worker was discharged because of his activity and that the discharge encouraged or discouraged union membership. We quote from Judge Fee's decision:

> "It is a salient point that the failure to report for work was an undeniable fact proved by the record. The assumed anti-AFL bias is an inference drawn by the Board . . ."

That case is similar to the instant case.

IV

SHOULD THE ORDER OF THE COURT OF APPEALS BE ENFORCED BY THE NATIONAL LABOR RELATIONS BOARD WHERE UNDER ITS REVISED RULES AFFECTING FUTURE AND PENDING CASES, THE BOARD WOULD BE WITHOUT JURISDICTION IN THIS CASE.

Petitioner believes that the question of the jurisdiction of the National Labor Relations Board should be presented to this court inasmuch as the Board has the duty and obligation to enforce, or assist in the enforcing, of the Judgment. Since the revised rules would deprive the Board of jurisdiction of this case, and since this case is still pending as to enforcement Petitioner believes that this case should be reviewed and set aside as it would create an untenable position on the part of the Board and inflict an injustice on

this petitioner as compared with others in a similar position. The Board is now dismissing cases that do not meet the new test.

The record, page 7, shows that this small company purchased products from outside the state valued at approximately $250,000 annually and made sales totalling $275,000 annually. This amount of business transacted does not comply with the new rules for jurisdiction adopted by the Board on July 1, 1954. (See Appendix page 40.)

CONCLUSION

The "Homedale Case" has caused nation-wide attention because the owner of a small business located in a small town has been found guilty by a Government Agency on the findings of a Trial Examiner based on inferences and guesses and not by direct or substantial evidence. The Trial Examiner said the employer

(1) had knowledge that the union was organizing his place of business when he discharged three employees on June 21, and

(2) that the employer discharged the employees for the purpose of discouraging union activities, and

(3) that the discharges had the proximate effect of discouraging membership in the union.

The Petitioner positively stated under his oath that

he had absolutely no knowledge that the union was organizing his place of business at the time of the discharges of the three employees, Maybon, Watkins and Snyder. (R 135-136.)

Petitioner therefore believes that under the theory of the decision of the case of *Universal Camera Corp. vs. NLRB* (340 U. S. 474) this case should be reviewed by the Supreme Court and the decision of the Court of Appeals be set aside together with such other and further relief as to the Court may seem just, fair and equitable.

Wherefore the Petitioner respectfully submits that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,
ELI A. WESTON,
Boise, Idaho,
Attorney for Petitioner.

OSCAR W. WORTHWINE,
Boise, Idaho,
Of Counsel.

Dated: July, 1954.

APPENDIX A

United States Court of Appeals For The Ninth Circuit

No. 13,726
Mar. 3, 1954

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

C. W. RADCLIFFE and W. W. MANCKE, co-partners, doing business as HOMEDALE TRACTOR & EQUIPMENT CO.

Respondents.

Petition for enforcement of an Order of the National Labor Relations Board

BEFORE: DENMAN, Chief Judge; POPE, Circuit Judge; and DRIVER, District Judge.

DRIVER, District Judge.

The National Labor Relations Board petitions for enforcement of its order, based upon findings that respondents C. W Radcliffe and W. W. Mancke, co-partners doing business as Homedale Tractor & Equipment Company, engaged in unfair labor practices. Specifically, the Board's findings are that respondents interfered with union organizational activities of its employees by the strategically timed an-

nouncement of a profit-sharing plan, interrogated an employee regarding his and other employee's union sympathies, and threatened to close their establishment, if it were unionized, all in violations of Section 8 (a) (1) of the National Labor Relations Act (29 U.S.C.A., Sec. 158a (1), Supp.); and discriminatorily discharged for their union activities, five employees, in violation of Section 8 (a) (1) and (3) of the Act (29 U.S.C.A., Sec. 158a (1) and 3), Supp.) The Board's order directs respondents to cease and desist from engaging in such unfair practices, to offer reemployment to the three employees, not previously reinstated, and to make whole all five discharged employees for any loss of pay they may have suffered.

No jurisdictional issue is raised, as respondents concede and the record shows that they were engaged in commerce, within the meaning of the Act. The basic question presented is whether, considering the record as a whole, there is substantial evidence to support the Board's findings.

In June, 1951, respondents were engaged in the farm machinery and equipment business, in Homedale, Idaho, a town of 1500 to 2000 population, about forty-five miles from Boise. They had in their employ five mechanics and a number of set-up and delivery men, engaged in repair and maintenance work—just how many, the record does not show. Wilbur M.

Snyder, a mechanic, and eight other men who worked with him in respondents' shop met at Snyder's residence, in Homedale, on the evening of June 4, to discuss unionization. Snyder, previously had obtained from the International Association of Machinists, hereinafter called the Union, blank authorization cards, and all of the men who attended the meeting signed the cards, authorizing the Union to represent them for collective bargaining purposes.

On June 13, there was another meeting at Snyder's home, attended by the men at the first meeting, except George Otto. Robert E. Watkins, a set-up and delivery man and Allen K. Walker, business agent of the Union, at Boise, also were present. Walker talked to the men about the operation and advantages of the union, and unionization was further discussed. Watkins, at that time, signed an authorization card.

On the evening of June 20 respondents called a meeting of their employees, at their place of business. Such meetings, previously, had been held at odd times, on the average of once or twice a month. Respondent Radcliffe, in giving advance notice of the meeting of June 20, told one of the mechanics it was absolutely necessary to be there. He told other employees that they should let nothing short of a death in the family prevent them from attending. At the meeting, Radcliffe spoke concerning a profit-sharing plan, which he explained with the aid of a mimeographed statement, copies of which were passed out to the men. The

statement set forth the plan in detail in nine numbered paragraphs. It was headed, "An Incentive Award Plan for Employees of Homedale Tractor & Equipment Company," and, in the first paragraph, stated: "We are pleased to announce the details of an employees' 'profit-sharing plan', retroactive to January 1, 1951." The plan provided that the Company's employees were to share in the net profits under certain specified conditions. The division of profits was to be made quarterly, on March 31, June 30, September 30, and December 31 of each calendar year. At the end of each quarter profits allocated to the program were to be set up in two reserves, one-half to be "paid out immediately" and the other one-half to be held until the end of the year, when it would be distributed along with the fourth quarterly payment.

Checks for the quarter ending March 31 were handed out to the eligible employees present at the meeting. The checks were in substantial amounts. Snyder received $47.00 or $49.00 for his one-half, quarterly payment. No other payment was ever made to the employees under the plan. Radcliffe testified that, upon the advice of an attorney, payments were "suspended," for the reason that rulings of the Wage Stabilization Board indicated that they "were not within the law." On December 24, 1950, respondents had told their employees that a profit-sharing plan was being considered, but apparently nothing was done about it, and no further information regarding it was given to the

men until the meeting of June 20.

After he had explained the profit-sharing plan at the meeting, on June 20, Radcliffe admonished the employees for slackness in their work, discourtesies to customers, and whisperings among themselves, particularly "during the past two weeks." He warned them that if things did not improve, the guilty ones would be discharged. He said that they had a stack of applications about an inch thick and could replace any or all of the men at any time, if they did not "attend to business." Respondent Mancke then addressed the meeting and, in a loud and angry manner,[1] accused the employees of wasting time, visiting and talking and "fooling around," and threatened to "get tough," if conditions did not improve. Both Radcliffe and

[1]Snyder testified that "he [Mancke] was yelling at us that night, and you could have heard him, I think, about three-fourths of a city block, and all of us sitting right there close to him."

Mancke said that Watkins, who was not invited and did not attend the meeting, would be discharged the following day for his failure to perform a certain job of work.

Watkins had been employed on May 1, 1951, on a temporary, "trial basis" for three months. On June 20, he had steam-cleaned a mower, but had missed some spots on the under side. When Mancke inspected it, he told Watkins that it was not clean enough to be

painted and would have to be done over. It was then only ten or fifteen minutes before quitting time, and Watkins said that he would "get it the first thing" the following day. Mancke left without further comment.

Snyder, Maybon, and Watkins reported for work at the usual time the next morning, but, because of their resentment at what had happened at the meeting the previous evening, decided to go to Boise to confer with the Union's business agent, Walker. Snyder went to the office to tell Radcliffe that he would not be working that day but Radcliffe was not in and, after waiting for him for fifteen or twenty minutes, Snyder left. He and Maybon then picked up their tools and, accompanied by Watkins, who had no tools, went to Boise. They did not tell Howard Wilkins, the foreman, who was in the shop that morning, that they were leaving. In Boise Walker heard what they had to say and advised them to return to work. All of them did report for work the next day, June 22. Some time during the forenoon, Radcliffe called Snyder to the office and asked him why he had not worked the day before. Snyder told him that he was so "mad at what had happened at the meeting, he was in no condition for work and, after reporting at the shop, had changed his mind and had gone home. Radcliffe said that he would "think it over" and called Snyder back to the office that afternoon. He told Snyder to go back to work in the meantime.

The same forenoon, Maybon, together with the

foreman Wilkin, was summoned to the office. Radcliffe asked Maybon why he "hadn't been there" the previous day, and the latter said that it was on account of the meeting—he did not like to have people yell and scream at him. Radcliffe said, "How do we stand?" Maybon replied, "If it goes on like this, why, I will find something different." Radcliffe asked Maybon to work the rest of the day and get his check that night. Radcliffe also said that he should have let Maybon go three months earlier because Maybon and the Company "couldn't see eye to eye."

Also, on the morning of June 22, Watkins was called to the office. Radcliffe told him that, since he could not see "eye to eye" with the Company and couldn't seem to get along "with them," he should not work there any more. He was, thereupon, discharged. That afternoon, Radcliffe told Snyder he had "fired" Maybon and Watkins, but had decided to keep Snyder on, as his work had been satisfactory, and that Snyder could keep his job with the Company as long as he wished to do so.

On June 25, respondents received from the Union a letter informing them that the Union represented the majority of respondents' employees. The next day, Mancke called the employees together, read the letter, and remarked that it was up to them to decide whether or not they wanted the Union.

On June 27,[2] respondent Radcliffe summoned to the office Robert D. Stimmel, an employee who had attended the two union meetings in Snyder's home and had signed a union authorization card. Radcliffe told Stimmel that he knew about the meetings the employees had held and said it wasn't necessary to have spies—things just got around. He also said he knew that Jack Thomas left a meeting early "to pick up his wife"[3] and that he thought Wilbur Snyder was the "head of the business" and a troublemaker. Radcliffe said "four more guys" would be discharged and asked Stimmel how he felt about the Union and how the other employees felt about it. Stimmel was noncommittal. He said that he could get along with a union or without one, and that he did not know how "the other fellows" felt about the Union.

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[2]Stimmel had considerable difficulty fixing the date of his conversation with Radcliffe. However, it appears that a short time after it occurred, he had made a written statement in which the date was mentioned. After he had been recalled as a witness and had examined the statement to refresh his memory, he testified that the date was June 27. The Board found that to be the date of the conversation, and we have followed the Board's findings in our factual summary. In this connection we regard as erroneous the Board's acceptance of the Trial Examiner's finding that respondents had knowledge of the employees' actions in creating a union merely from the fact "that the employees had held two organizational meetings in a small community." The board's finding of such knowledge in Radcliffe is sufficiently based on Stimmel's testimony.

[3]Thomas did, in fact, leave the June 4 meeting early to meet his wife

On the same day, June 27, about five minutes before quitting time, Radcliffe called Snyder to the office,

handed him a check, and told him that, after thinking it over, they had decided to let him "go too," as he did not seem to be in sympathy with the Company. The next day, June 28, at about 5:45 P.M., Radcliffe called Jess Runger to the Company office and said to him: "Did you ever cut your arm off before?" To which Runger replied, "No, and I haven't right now that I know of." Radcliffe then said it was a hard thing to do, but, since Runger could not be in sympathy with the Company and satisfied with what he was getting, they were going to give him an opportunity to get a new job. Runger was then handed his pay check. About seven o'clock that evening, Ernest Runger, who had just returned from Boise, was asked by Radcliffe to come to the Company office. Respondent Mancke also was in the office. Runger asked what was the reason for his "getting fired," and Mancke said he was sorry that it had to happen, that Runger's work had been satisfactory and they "had gotten along nicely," but that Runger must be dissatisfied with his job, since he had asked for more money and they were going to let him get a job where he could make more money.

On July 7, each of the Rungers received a letter from respondents asking them to return to work on July 10. After the parties had signed an instrument dated July 9, which stated that the Rungers were "still in favor of the Union to represent us" and that Radcliffe and Mancke would "rehire them" with "all back pay

for lost time," both of the Rungers resumed their employment, as requested.

In arriving at its conclusion, the Board was not obliged to consider the facts and incidents just related separately and in isolation. It had a right to consider them compositely and to draw inferences reasonably justified by their cumulative, probative effects.[4] So considered, the timing of respondents' activities with reference to their employees was, we think, highly significant.

The Union meetings, attended by nine of respondents' employees, were held on June 4 and June 13, 1951. Among those who attended and signed union authorization cards, Ernest Runger had been in respondents' employ since August, 1948; Jess Runger, since Oct-

[4]Canyon Corp. v. N.L.R.B., 8 Cir., 128 R. 2d 953, 955.

ober, 1948; Maybon, since January, 1950; Snyder, since March, 1950, except for several months in the fall of 1950; and Watkins, since May 1, 1951. All were permanent employees, except Watkins, who was hired for a trial period of three months. So far as the record shows, none of them had been reprimanded or criticized by his employers. A pay raise had been given to Maybon on April 1, 1951, and to Jess Runger on June 1, 1951. In the short space of seven days, from June 22 to June 28, respondents discharged all five of the men above named.[4a] The discharges conformed

to the same general pattern; they were made summarily and without prior warning. The reasons respondents gave, according to the employees' testimony at the hearing, before the examiner, were: that Watkins and Maybon could not see "eye to eye" with the Company; that Snyder did not seem to be in sympathy with the Company; that Jess Runger was not in sympathy with the Company and was not satisfied with what he was earning; and that Ernest Runger had, previously, asked for a wage increase and, therefore, must be dissatisfied with his job. Snyder and Ernest Runger, each, was told by one of his employers, a short time before his discharge, that his work had been satisfactory.

In the proceedings before the Board, respondents gave various, inconsistent reasons for discharging five of their workmen in a single week. In their answer to the complaint, they alleged that the two Rungers were and, "except for a short period," had been, at all times, in their employ; that Watkins, "having been hired on a temporary basis only," ended his employment on June 22, 1951; and that Maybon and Snyder had voluntarily quit their employment, taking their tools "from the employer's premises" and leaving without notice. At the meeting of June 20, Radcliffe and Mancke joined in the announcement that Watkins would be fired the next day for his failure to steam-clean a mowing machine properly. In his testimony before the examiner, Radcliffe said that Watkins and

Maybon had been discharged for "taking French leave." Although both of them testified at the hearing, respondents did not offer any explanation why Jess and Ernest Runger had been discharged. The failure to give a reason, or the giving of evasive, inconsistent,

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4A Respondents did not discharge a single non-union employee.

or contradictory reasons by management for the discharge of employees, properly, may be considered by the Board, as it was in the instant case, in determining the real motive which actuated the discharges.[5]

Jess and Ernest Runger were discharged on June 28, after respondents had actual notice of union activity in their shop. The two workmen were re-employed on July 10, it is true; but the respondents offered the re-employment on the advice of their attorney. It was good advice. The discharges of the Rungers could not reasonably be explained on any basis other than that of union activity. If they quit or were let out because of a disagreement over wages, as respondents now contend on this appeal, it hardly seems likely that the Rungers would have been reinstated in their jobs within two weeks, at the same wages and with an agreement that their employers reimburse them for their back pay.

Although respondents informed their employees, on December 24, 1950 that they were considering the adoption of a profit-sharing plan, nothing further was

done, and no additional information was given to the workmen regarding it until after the unionization meeting of June 13. Within a few days thereafter, the men were notified to attend a Company meeting on the night of June 20. They were told that nothing short of a death in the family should keep them away. At the meeting, a profit-sharing plan was announced, "retroactive to January 1, 1951," and an elaborately detailed, mimeographed statement of the plan was distributed to the employees present. No explanation was offered by respondents as to when the details of the plan had been worked out, or when they had been written up and mimeographed. According to the plan, a payment to the employees was to be made "immediately," at the end of each quarter, but the payment for the quarter which ended March 31 was not made until June 20. No other payment, under the plan, was ever made to the employees.

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[5]N. L. R. B. v. Yale & Towne Mfg. Co., 2 Cir., 114 F. 2d 376, 378; N.L.R.B. v. Condenser Corp., 3 Cir., 128 F. 2d 67, 75; N. L. R. B. v. Northwestern Mutual Fire Ass'n., 9 Cir., 152 F. 2d 866, 868-869; N.L.R.B. v. International Furniture Co., 5 Cir., 199 F. 2d 648, 650.

On June 27, two days after respondents had been notified by the Union that it represented a majority of their workmen, Radcliffe called employee Stimmel to the office and talked with him about union activities in the shop. Radcliffe not only said that he knew about the Unionization meetings, but he related an incident which indicated that he had accurate, detailed inform-

ation as to what had transpired at the first meeting. He said he thought that Snyder was the leader of the unionization movement and displayed his hostility to the Union by referring to Snyder as a "troublemaker" and to his union activities as "the trouble." Radcliffe's statement to Stimmel, in the course of their conversation, as to what action the former had taken or was about to take, that "four more guys" would be discharged, plainly implied that Watkins and Maybon had been fired on June 22 on account of their union activities and that more of the same kind of discharges would follow. When Radcliffe thereafter, asked Stimmel what he and his fellow-workmen thought about the Union, the interrogation was, necessarily, coercive and an unwarranted interference by the employer with the workman's right of free choice to make or to maintain union affiliation. It is worthy of note that Stimmel adopted a noncommittal, conciliatory attitude by assuring Radcliffe that he could work without, as well as with, a union and that he was not discharged.

The two respondents were the only witnesses who testified in their behalf. They denied that they had interfered in any way with unionization in their shop, and they specifically denied that they had any knowledge of union activity on the part of their employees prior to June 25. But the trial examiner, whose report and findings were adopted by the Board, did not credit their testimony.[6] Although the determination whether

[6]The following is a quotation from the findings of fact of the trial examiner:

Respondents testified that neither knew of the employees' activities on behalf of the Union until June 25, the day they received the letter announcing that the Union represented a majority of the employees. This testimony is not credited. The demeanors of Radcliffe and Mancke, while they were on the witness stand, evidenced to the undersigned that they were withholding the true facts regarding the controversy.

there is substantial evidence to support the Board's findings of fact must be made on the basis of consideration and appraisal of the record as a whole,[7] that does not mean that we are obligated to give weight to testimony which the Board, in the rightful exercise of its functions as arbiter of the facts, rejected as not worthy of credit.[8] And the Board rightfully may decline to credit the testimony of interested witnesses, even though such testimony is not contradicted.[9]

The announcement of the profit-sharing plan on June 20 and the discharges of Watkins and Maybon on June 22 cannot be regarded as unfair labor practices on the part of respondents, unless it be assumed that they knew of the union activities of their employees. There is no direct evidence of knowledge in the record, but if the circumstances are such as to support a reasonable inference, the Board may find knowledge from circumstantial evidence.[10] At the meeting of June 20, respondents criticized and upbraided their employees for work slackness, lack of attention, and misconduct in the performance of their duties during the preceding two weeks, a period which, roughly, coincided with the union organizational activities of

the employees. Respondent Radcliffe testified that the shop mechanics actually had engaged in the objectionable practices and deserved to be "bawled out." On the other hand, two of the discharged workmen testified that there had been no such misconduct and, hence, the criticism was unwarranted. It was the function of the Board to resolve the conflict; but we think the lack of corroboration of respondents, under the circumstances, weighs heavily in favor of the testimony of the employees. Respondents' shop foreman, Howard Wilkin, was in an excellent position to know whether or not the shop mechanics had been "laying down on the job" during the two weeks prior to June 20. He did not participate in any union activities; it

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729 U.S.C.A., Sec. 160(e), 1953 Supp, and Universal Camera Corp. v. N.L.R.B., 340 U.S. 474.

8N.L.R.B. v. San Diego Gas & Electric Co., 9 Cir., 205 F. 2d 471, 475.

9N.L.R.B. v. Howell Chevrolet Co., 9 Cir., 204 F. 2d 79, 86; See also Mar Gong v. Herbert Brownell Jr. (No. 13,787, Jan. 12, 1954), 9 Cir., —— F. 2d ——.

10N.L.R.B. v. Link-Belt Co., 311 U. S. 584, 602; N.L.R.B. v. Abbott Worsted Mill, 1 Cir. 127 F. 2d 438, 440.

appears that he was friendly to and in sympathy with his employers; but they did not call him as a witness to corroborate Radcliffe's testimony as to the workmen's misconduct, although the record indicates that he was present at the examiner's hearings. To all the other attendant circumstances, discussed above, indicative of knowledge, we may then add the justifiable assumption that, at the meeting of June 20, respond-

ents were angry and displeased with their employees for no apparent, good reason and criticized and "bawled them out" for work negligence and misconduct of which they were not, in fact, guilty.[11]

It is our conclusion that, considered as a whole, the record affords substantial support for the Board's findings that respondents engaged in unfair labor practices, in violation of Section 8 (a) (1) and (3) of the National Labor Relations Act (29 *U.S.C.A., Sec.* 158*a* (1) *and* (3), *Supp.*)[12] We make this one exception. We find no support in the record for the finding that respondents threatened to close their business, if it became unionized. The direction to the respondents in the Board's order to cease and desist from that practice should be deleted. The form of notice attached to the order as an appendix should be, correspondingly, amended.

As thus modified, the Board's order will be enforced.

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[11]We are not impressed by the argument that, if they had known of the union activities of their employees, respondents, in all probability, would not have given them a pay bonus and, at the same meeting, verbally abused and upbraided them. The "stick-and-carrot" technique, that is to say, the use of a combination of censure and cajolery, of threats and promises, is a well known and commonly employed method of influencing action in police circles and elsewhere.

[12]N.L.R.B. v. A. S. Abell Co., 4 Cir., 97 F. 2d 951; N.L.R.B. v. Laister-Kauffman Aircraft Corp., 8 Cir., 144 F. 2d 9; N.L.R.B. v. W. T. Grant Co., 9 Cir., 199 F. 2d 711; N.L.R.B. v. San Diego Gas & Electric Co., 9 Cir., 205 F. 2d 471; N.L.R.B. v. West Coast Casket Co., 9 Cir., 205 F. 2d 902.

POPE, Circuit Judge, concurring:

To my mind it is clear that there was basis in the record for a finding that employee Snyder was discharged for his union activity. This happened, as Judge Driver's opinion shows, on the evening of June 27, after the employer Radcliffe's talk with Stimmel, which was after the employers received the union's letter informing them of their claim of representation.

But I have had great difficulty in finding any evidence whatever that on June 22 when Maybon and Watkins were discharged, the employers knew that concerted activity to organize a union was afoot. The Examiner drew an inference to this effect from the fact that this was a small community, evidently on the assumption that in a town of that size everyone knows everyone else's business, an interesting but wholly novel and insupportable rule of evidence.[1] The fact that the Board, as it had the right to do, refused to credit the testimony of the employers that they did not know of the union activity, is no proof that they did. Belief that a witness is lying is not a substitute for evidence that the opposite of his testimony was the fact. *A witness who testified that a horse was white, in a manner and with such demeanor as to convince the tribunal that he is testifying falsely, does not thereby furnish proof of an allegation that the horse was black.* A district court, furnished with nothing better than that, would have to direct a verdict against its proponent. *Cf. Dyer v. MacDougall*, (2 cir.), 201 F. 2d 265, 269.

To my mind the events of June 20, taken together, disprove the Board's charges. I cannot think the Board could seriously believe that in order to *influence the men respecting their concerted activities the employers, on that very evening, both wooed the men with bonuses and abused and insulted them with accusations* "in a loud and angry tone of voice". And consider also the fact that when Maybon and Watkins, on June 22, were discharged for having taken their tools and left without notice the day before, Snyder, who had done the same thing, was kept on when he told a tale about

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[1]Under Title 29, §160(b), the Board's proceedings must measure up to "the rules of evidence applicable in the district courts."

having gone home. *Surely this would indicate that it was not then known that Snyder had been organizing a union.*

Hence, on that much of the record, I would think the order for reinstatement of Maybon and Watkins could not be sustained. However, there is one further aspect of the testimony which leads me, although with considerable hesitation, to conclude that there was one bit of evidence of knowledge on the part of the employers at those earlier dates. I think the Board could believe that Radcliffe, in his conversation with Stimmel, was trying to create the impression that the employers had known all along, and at the time of the meetings, what was going on. This was evidently his

purpose in showing off what he knew about Jack Thomas leaving the meeting, and in saying it wasn't necessary to have spies. True, a literal reading of the testimony does not show that Radcliffe said, in substance, "I knew of your meetings when they were held", but the effort to convey such an impression could be inferred. And if he was trying thus to convey that impression, I think that it amounted to an admission to the same effect. An admission of such prior knowledge would of course be sufficient to support the finding.

(Endorsed:) Opinion and Concurring Opinion. Filed Mar. 3, 1954 (as amended by Order of April 27, 1954) Paul P. O'Brien, Clerk.

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. 151 et seq.), are as follows:

Definitions

Section 2—When used in this subchapter—

Commerce

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several states, or between the District of Columbia

or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or Territory or the District of Columbia or any foreign country.

Affecting Commerce

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3).

Unfair Labor Practices

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the right guaranteed in Section 7;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; . . . . .

NLRB Release of June 30, 1954—(CCH §14,014)

F. A franchise from a national enterprise will not be sufficient in and of itself to bring a company under the Board's jurisdiction.

G. The Board abolished the "combination category": jurisdiction will *not* be determined by combining the percentages which a company has in each of the dollar-volume categories.

The Board announced that these changes in its jurisdictional standards will take effect immediately. The new standards will be applied to pending cases as well as those filed hereafter.

4. Enterprises producing or handling goods destined for out-of-state shipment or performing services outside the state in which the firm is located, where such goods or services are valued at $50,000 a year. (Formerly $25,000 a year.)

6. Enterprises with a direct inflow of goods or materials from out of state valued at $500,000 a year.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 239

HOMEDALE TRACTOR & EQUIPMENT CO., a co-partnership consisting of Cyril W. Radcliffe and Wilbur W. Mancke, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. 19-38) is reported at 211 F. 2d 309. The findings of fact, conclusions of law, and order of the National Labor Relations Board, including the Intermediate Report of the Trial Examiner (R. 12-36, 43-52), are reported at 101 NLRB 167.

JURISDICTION

The judgment of the court below was entered on March 3, 1954. A petition for rehearing, filed on April 5, 1954, was denied on April 27, 1954. The petition for a writ of certiorari was filed on July 26, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and under Section 10(e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Whether substantial evidence on the record as a whole supports the finding of the National Labor Relations Board that petitioner discharged five employees because of their union activity, in violation of Section 8(a)(3) and (1) of the National Labor Relations Act.

2. Whether, in view of the circumstance that the Board in the exercise of its discretionary authority might not now assert jurisdiction over petitioner, the Board's order against petitioner is entitled to enforcement.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, *et seq.*), are set forth in the Appendix to the Petition.

STATEMENT

I. The Board's findings of fact, conclusions of law, and order

The National Labor Relations Board found that petitioner (referred to as the Company) was engaged in commerce within the meaning of the Na-

tional Labor Relations Act. The Board further found that the Company in violation of Sections 8(a)(1) and 8(a)(3) of the Act had interfered with and restrained its employees in the exercise of their rights under the Act and discharged five employees because of their membership in, and activities on behalf of, International Association of Machinists, Local Lodge 1491, (the Union). The subsidiary facts upon which these findings are based may be summarized as follows:

A. *The Company's business.*—The Company, a co-partnership consisting of Cyril W. Radcliffe and Wilbur W. Mancke, is engaged in the sale, repair, and servicing of new and used farm equipment, cars, and trucks, and in the sale of various other products (R. 14-15; 6-7, 10, 58). It operates under various franchises issued by, among other manufacturers, the Willys-Overland Company, the John Deere Plow Company, and the Goodyear Tire Company (R. 15; 7, 59). The Company's principal office and place of business is in Homedale, Idaho (R. 14-15; 7, 10, 58). Its purchases from points outside the State of Idaho are "in excess of" $300,000 annually (R. 15; 59, 7, 10). Its shipments to points outside the State of Idaho are "in excess of" $30,000 annually (R. 15; 59). Its total sales exceed $275,000 annually (R. 7, 10).

The Company conceded, and the Board found, that the Company is engaged in commerce within the meaning of the Act (R. 15; 59).

B. *The unfair labor practices.*—Early in June

1951, practically all of the Company's employees met at the home of employee Snyder and signed cards authorizing the Union to act as their collective bargaining representative (R. 15-16; 67-70, 76, 78-79). Shortly thereafter, on June 20, the Company held a meeting of the employees at the plant (R. 16; 62, 72-73, 80, 98, 142).

When the employees assembled, Radcliffe, one of the partners in the Company, opened the meeting by outlining the details of a profit-sharing plan which, although it had been briefly mentioned to the employees six months earlier, had lain dormant ever since (R. 16; 23-24, 61-62, 103, 146). Radcliffe announced that the plan was being put into effect immediately, retroactive to January 1, and checks were distributed to the eligible employees for their respective shares (R. 16, 24; 64, 67).

Immediately following the distribution of the checks, Radcliffe launched into a criticism of the employees' behavior, particularly "during the previous two weeks" (R. 16-17; 81-82, 143). Noting that there had been extensive whispering and visiting among the shop personnel during working hours, Radcliffe warned that if conditions did not improve, he would discharge the guilty parties (R. 17; 81-82, 83, 98-99, 143). Specifically, he stated that the Company had a pile of job applications "an inch thick" from which replacements could be drawn unless the employees mended their ways (R. 17; 83). Finally, Radcliffe made the statement that employee Watkins had failed to clean a mowing

machine properly and would be discharged the following day (R. 17, 47; 71, 82).

When Radcliffe finished speaking, his co-partner, Wilbur W. Mancke, addressed the employees and angrily accused them of not doing proper work, of wasting time by visiting one another, and of engaging in extensive talking among themselves (R. 17; 91-92, 98-99). Mancke threatened that if the employees did not correct the situation, he would remedy it even if he had "to get tough" (R. 17; 99). Mancke then repeated Radcliffe's statement that Watkins would be discharged the following day (R. 17, 47; 72, 82).

Several days later, on June 25, the Company received formal notice from Walker, the Union agent, that the Union represented a majority of the employees and that it desired exclusive recognition (R. 19, 45; 135-136). Mancke read the letter to the employees on the morning of June 26 (R. 19; 123).

On June 27, parts man Robert Stimmel, who had signed a designation card on June 4, was summoned by Radcliffe to the latter's office (R. 19-20, 22-23, 44; 115-116, 134-135, 150-152). Radcliffe told Stimmel that he was aware the employees had been holding meetings; that he did not "have to have spies to find out, those things just got around"; that Jack Thomas left one meeting before the others did; that Snyder was the employee spearheading the Union drive and "causing the trouble"; that "four more guys" were going to be discharged—

Maybon and Watkins had already been discharged on June 22 (see *infra*, pp. 6-7)—and that the Company "couldn't operate with the union in the shop" (R. 19-20, 44, 45-46; 115-117). Radcliffe also asked Stimmel how he and the other employees felt about the Union (R. 20, 22; 117-118).

While thus manifesting its opposition to the union campaign, the Company took more concrete action to rid its plant of union adherents.

On June 21, the morning after the June 20 meeting, employees Maybon, Snyder and Watkins discussed the criticisms which the Company had levelled at the employees and decided that they should go to Boise to consult with Union representative Walker concerning the situation (R. 17, 18, 48; 84, 99, 109). The three employees left for Boise without obtaining prior permission (R. 18, 48; 72, 84, 93-94, 112). Walker advised the three individuals to return to work (R. 18; 94).

On the morning of June 22, Watkins, Maybon, and Snyder reported for work at the usual hour (R. 18, 48; 85, 100, 109). Sometime during the morning, Radcliffe called Snyder into his office and asked why the latter had not worked the preceding day (R. 18; 85). Snyder replied that the Company's remarks at the June 20 meeting had angered him to the point where he would have been unable to work if he had reported to his job (R. 18; 85). Radcliffe then directed Snyder to return to his job while the Company considered what action to take (R. 18; 85-86). That afternoon Radcliffe told Snyder that "he had fired two men, Mr. May-

bon and Mr. Robert Watkins and . . . as far as my part was concerned . . . he decided to keep me on, my work had been satisfactory and that he would like to have me stay with the company, that I had a job as long as I wanted it" (R. 18-19, 48; 86). Two days later, on June 24, Mancke endorsed Radcliffe's statement by telling Snyder that the Company wished him to stay with the firm (R. 86-87). On June 27, however, just before closing time, the Company, which had in the meantime received the Union's formal demand for recognition, notified Snyder that he "didn't appear to be in sympathy with the company" and gave him his final check (R. 20, 46; 87).

As Radcliffe told Snyder, Maybon and Watkins were discharged on June 22. Maybon was summoned into Radcliffe's office that morning and his absence the previous day was discussed (R. 19; 100-101). Radcliffe then asked Maybon to finish the job he was on and, when it was completed, gave Maybon his check and discharged him (R. 19, 48; 101). Watkins was discharged on the same day and in similar fashion; Radcliffe explained to Watkins that the latter "couldn't see eye to eye with the company, and couldn't seem to get along with them, and . . . should[n't] work there any more" (R. 19, 48; 109-110).

Jess and Ernest Runger, the fourth and fifth Union adherents whose employment was terminated, were discharged on June 28, six days after the discharges of Maybon and Watkins. Radcliffe first discharged Jess because "you can't be in

sympathy with the company, and satisfied with what you are getting," and Ernest was discharged later on the ground that a prior request for a wage increase demonstrated that he was "dissatisfied" with his job (R. 21, 46; 123, 153). On July 7, less than 2 weeks after their discharge, the Rungers returned to work after the Company, on advice of counsel, invited them to do so and promised to reimburse them for the wages they lost up to the date of their re-employment (R. 21, 47; 149, 124-128, 153-154).

The Company offered a variety of reasons to explain the rapid-fire discharge in less than a week of five of the seven maintenance employees who had signed designation cards authorizing the Union to represent them. In its answer to the complaint, the Company urged that Watkins had been hired on a temporary basis and his employment ended, that Maybon and Snyder had "voluntarily quit their employment", and that the Rungers "are at the present time, and have been, except for a short period, at all times" in the Company's employ (R. 25-27, 47; 8, 11).

At the hearing before the Trial Examiner, the Company changed its position. In respect to Watkins, it claimed that he was hired on a temporary basis only and that it had been decided to discharge him even before the "mower incident" which gave rise to the comments at the June 20 meeting (R. 70-71). On the other hand, in reply to a direct question as to why he had fired Watkins, Radcliffe answered, "I fired him for taking French leave" (R. 72). Radcliffe gave the same reason for firing

Maybon although he did not explain why Snyder, known to have committed the same offense, was retained 5 days longer (R. 72). Nor did the Company offer any explanation at the hearing for its discharge of Jess and Ernest Runger.

Upon the foregoing facts, the Board found that the Company, in violation of Section 8(a)(1) of the Act, unlawfully interfered with the organizational efforts of its employees by strategically timing the announcement and effectuation of a profit-sharing plan to demonstrate the lack of need for a union, by interrogating Stimmel as to his union sympathies and the sympathies of other employees, and by predicting the closing down of operations if the union campaign succeeded. The Board also concluded that the real reason for the discharge of the five union adherents was their union activity and that the Company in discharging them for that reason violated Section 8(a)(3) and (1) of the Act (R. 31, 49).

C. *The Board's order.*—The Board ordered the Company to cease and desist from the unfair labor practices found, or from in any other manner interfering with the rights guaranteed their employees by Section 7 of the Act (R. 49-50). Affirmatively, the Board ordered the Company to reinstate Watkins, Maybon, and Snyder with back pay; to make Jess and Ernest Runger whole for wages lost during the period when they were discriminatorily denied employment if it had not already done so; and to post appropriate notices (R. 50-52).

II. The decision of the court below

The Court of Appeals held (Pet. 19-38) that the Board's findings, other than its finding that the Company threatened to close the plant if it were unionized, were supported by substantial evidence on the record considered as a whole. The court enforced the Board's order, except for that portion requiring the Company to cease and desist from threatening to close the plant if it were unionized.

ARGUMENT

1. The heart of the Company's case is (Pet. 5-16) that the record fails adequately to support the Board's findings, approved by the court below, that the Company had knowledge of the union activity of three of the five employees discharged and that it terminated the employment of all five because of such activity.[1] This challenge to the substantiality of the evidence supporting the Board's findings in these respects raises no issue warranting review by this Court. *General Talking Pictures Corp.* v. *Western Electric,* 304 U. S. 175, 178; *National Labor Relations Board* v. *Pittsburgh Steamship Company,* 340 U. S. 498, 503.

In any event, the record furnishes adequate support for the Board's findings. As the Statement set forth above (pp. 6-8) discloses, all five discharges were concentrated within a period of a few days at the peak of the union campaign to which the Company was hostile. Three of the dis-

[1] The Company concedes (Pet. 14) that it had knowledge of the Rungers' union activities prior to their dismissal.

charges occurred shortly after the Company stated that it knew Snyder was the employee spearheading the Union drive and "causing the trouble" and that "four more guys" were going to be discharged. Each of the discharges was summary in character. No prior warning or admonition was given any of the employees that shortcomings in their work might lead to discharge, and the sole reason given at the times of their termination was that they did not see "eye to eye with the company" or that they were not "in sympathy with the company" or that they were "dissatisfied" with their jobs (*supra*, pp. 7-8). The Company advanced no credible explanation for the dismissals. In all the circumstances, the Board could properly conclude, as the court below held (Pet. 28-35), that the Company had knowledge of the five employees' union activity and discharged them for that reason.

This finding, adequately supported by the evidence, disposes of the Company's further contention (Pet. 15) that there is "nothing in the record here to prove . . . that the discharges had the proximate or predictable effect of discouraging membership in the union." As this Court has stated, "such proof is not required where encouragement or discouragement can be reasonably inferred from the nature of the discrimination." For "a natural consequence of discrimination, based solely on union membership . . . is discouragement . . . of membership in such union . . ." *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 46, 51.

2. The Company's suggestion (Pet. 16-17) that the order, enforced by the court below, should be set aside because the Board under its current administrative policy might not now assert its jurisdiction over the Company's operations likewise presents no issue for this Court's consideration.[2] The Company's interstate operations (*supra*, p. 3) plainly bring it, as the Company conceded before the Board and did not dispute in the court below, within the coverage of the Act. The Board's statutory authority being clear, "The fact that by a self-denying rule or order made since this complaint was filed and order entered, the Board has set limits to the exercise in the future of the jurisdiction it possesses is not a matter of which [the employer] may avail." *National Labor Relations Board* v. *Red Rock Co.*, 187 F. 2d 76, 78 (C. A. 5),

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[2] On the record here, it cannot even be said with certainty that the Board under its current policy would not assert its statutory jurisdiction in a case like this one. The record shows (*supra*, p. 3) that the Company's purchases from outside the state are "in excess of" $300,000 per year and its shipments to points outside the state "in excess of" $30,000 per year. For all that appears, the actual volume of the Company's purchases and shipments may equal or exceed the amounts fixed by the Board for the exercise of its jurisdiction with respect to enterprises similar to that of the Company, *i.e.*, out-of-state shipments of $50,000 a year or out-of-state purchases of $500,000 a year (Pet. 40).

certiorari denied, 341 U. S. 950.[2a] Moreover, "Providing the Board acts within its statutory and constitutional power it is not for the courts to say when that power should be exercised." *National Labor Relations Board* v. *Townsend*, 185 F. 2d 378, 383 (C. A. 9), certiorari denied, 341 U. S. 909.[3]

[2a] The court below did not, of course, reach this question since the change in the Board's policy was made after the decision below issued. The Eighth Circuit, in a decision handed down on August 10, 1954, distinguished *Red Rock, supra*, and held, for reasons that are not entirely clear, that a Board order directed to an enterprise over which the Board would not assert jurisdiction under its current policy was not entitled to enforcement. *National Labor Relations Board* v. *National Gas Co.* (No. 14,739, not yet reported). The court apparently gave decisive weight to the circumstance, not present here, that the Board had subsequently "expressly overruled" the decision in which the order had been issued because the Board deemed it to be an "unwarranted extension" of its then controlling jurisdictional policy (*Brooks Wood Products*, 107 NLRB No. 71).

[3] *Accord: Haleston Drug Stores, Inc.* v. *National Labor Relations Board*, 187 F. 2d 418, 421 (C.A. 9), certiorari denied, 342 U.S. 815; *National Labor Relations Board* v. *Gulf Public Service Co.*, 116 F. 2d 852, 854-855 (C.A. 5); *National Labor Relations Board* v. *Mid-Co Gasoline Co.*, 183 F. 2d 451, 453 (C.A. 5); *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 181 F. 2d 34, 36 (C.A. 2), affirmed, 341 U.S. 694.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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